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State v. Jensen Appellant's Supplemental Brief Dckt. 36018

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 36018
)	
v.)	
)	
VICKI A. JENSEN,)	APPELLANT'S
)	SUPPLEMENTAL
Defendant-Appellant.)	BRIEF

COPY

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

This Supplemental Brief is intended to clarify the arguments raised in the first issue of the Appellant's Brief: whether the district court lacked jurisdiction to order restitution in Ms. Jensen's case. After further reflection, undersigned counsel determined that this issue really presents two separate issues and requested that she be allowed to file a supplemental brief to clarify and preserve both of these issues. (See Motion for Supplemental Briefing.) This request was granted by the Idaho Supreme Court. (Order Granting Motion to File Supplemental Appellant's Brief.)

Therefore, Ms. Jensen now contends that the district court lacked subject matter jurisdiction to order restitution years after her case had become final. Furthermore, even if the district court had subject matter jurisdiction to order restitution, the district court erred in ordering restitution because the State failed to demonstrate how restitution was necessary. Additionally, the district court's original restitution order, which was vacated by the district court and not appealed from by the State, should not now be affirmed on appeal. Finally, Ms. Jensen refers this Court to her Appellant's Brief, for her arguments in support of her final issue on appeal, whether the district court abused its discretion in ordering her to pay \$22,500 in restitution in light of her lack of financial resources and earning ability.

Statement of the Facts and Course of Proceedings

The Statement of Facts and Course of Proceedings were previously articulated in the Appellant's Brief and are incorporated herein by reference.

ISSUES

1. Did the district court have subject matter jurisdiction to enter either restitution order years after Ms. Jensen's criminal case had become final?
2. Did the district court err in ordering restitution because the State failed to demonstrate the delay in filing for restitution was reasonable and necessary?
3. Should the district court's original restitution order, which was vacated by the district court and not appealed from by the State, now be affirmed by this Court?
4. Did the district court abuse its discretion when it ordered Ms. Jensen to pay \$22,500 in restitution in light of her inability to pay?

ARGUMENT

I.

The District Court Lacked Subject Matter Jurisdiction To Enter Either Restitution Order Years After Ms. Jensen's Criminal Case Had Become Final

The district court lacked subject matter jurisdiction to order Ms. Jensen to pay restitution in this case; therefore, neither order of restitution should have been entered. A district court's lack of subject matter jurisdiction is an issue that can be raised at anytime. *State v. Armstrong*, 146 Idaho 372, 375, 195 P.3d 731, 734 (Ct. App. 2008); *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131. Subject matter jurisdiction generally refers to a court's general power or ability to hear and decide a particular class or type of cases. See *id.* at 227-28, 91 P.3d at 1131-32. The Idaho Supreme Court has been reluctant to grant subject matter jurisdiction to criminal courts beyond that which is provided for by statute or court rule. In *State v. Jakoski*, 139 Idaho 352, 79 P.3d 711 (2003), the Idaho Supreme Court noted that it has "long recognized that a court's jurisdiction to amend or set aside the judgment in a case does not continue forever." 139 at 554, 79 P.3d at 713. The Court went on to find that "absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." *Id.* at 355, 79 P.3d at 714. Similarly, in *State v. Taylor*, 142 Idaho 30, 121 P.3d 961 (2005), the Court found that under Idaho Code § 19-2601 (4) the district court's jurisdiction under the retained jurisdiction statute in effect at that time expired after 180 days and the district court could no longer place the defendant on probation once that time period had passed. *Id.* at 31, 121 P.3d at 962.

In Idaho, it is generally recognized that criminal courts have no power or authority to direct reparations or restitution to a crime victim in the absence of a statutory provision to such effect. *State v. Richmond*, 137 Idaho 35, 37, 43 P.3d 794, 796 (Ct. App. 2002). Idaho Code section 19-5304 provides authority for the district court in a criminal case to order the payment of restitution to the victims of the defendant's crime. *Id.* Specifically, Idaho Code section 19-5304(6) provides that "[r]estitution orders **shall** be entered by the court at the time of sentencing or such later date as deemed necessary by the court." I.C. § 19-5304(6) (emphasis added.); see also *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (2002).

Here, Ms. Jensen contends that, much like in the case of a defendant's plea, once the remitter in her case was issued and the judgment of conviction became final, the district court no longer had jurisdiction over her case. See *State v. Jakoski*, 139 Idaho 352, 79 P.3d 711 (2003). Therefore, the district court lost jurisdiction over Ms. Jensen's case in June 2002. (See R.36018, pp.11, 56.) Furthermore, even if the vague language in 19-5304(6) allowing restitution to be entered at a later date "deemed necessary by the court" allows for restitution to be entered after the district court's jurisdiction to alter the judgment in other aspects has ended, this should be narrowly construed and, in this case, over five years later was not necessary.

Although no definition or clarification is given in the statute regarding when a later date is "necessary," in *Ferguson*, the Idaho Court of Appeals explained, "[t]his section contemplates that that the court may need to grant the prosecution a **reasonable** amount of time **necessary** to gather information so as to locate all the victims and correctly compute the amount of restitution." *Ferguson*, 138 Idaho at 662, 67 P.3d at

1274 (emphasis in original). The court found that the authority to enter restitution under section 19-5304 was not limitless stating, “[i]t does not, however, vest the court with the power to extend the entry of the order of restitution beyond the closing of the case and discharge of the defendant.” *Id.* Unfortunately, to what extent “a reasonable amount of time necessary” extends was not discussed beyond the context of that case and no other appellate cases in Idaho have dealt with this issue.

However, in the Idaho Criminal Rule 35 (*hereinafter*, Rule 35) context, the Idaho appellate courts have better defined or addressed “a reasonable time.” The Courts have determined that when a Rule 35 motion is filed by a defendant, the district court must rule on it within reasonable time or it loses jurisdiction. See *State v. Day*, 131 Idaho 184, 185, 953 P.2d 624, 625 (Ct.App.1998) (quoting *State v. Chapman*, 121 Idaho 351, 354, 825 P.2d 74, 77 (1992)). In *State v. Nickerson*, 123 Idaho 971, 974, 855 P.2d 56, 59 (Ct. App. 1993), the Idaho Court of Appeals found that although “no action was taken on Nickerson’s motion to reduce his sentence for approximately one year while the appeal from the judgment proceeded,” the district court ruled on the motion within a reasonable period of time. *Id.* Therefore, the district court did not lose jurisdiction to act on Nickerson’s Rule 35 motion. *Id.* at 975, 855 P.2d at 60. However, the Idaho Court of Appeals has noted that thirty-four months is an unreasonable amount of time, when no justification for the delay was given. *State v. Payan*, 132 Idaho 614, 619, 977 P.2d 228, 233 (Ct. App. 1998). In *Payan*, the Court of Appeals held that the district court lost jurisdiction to rule on the Rule 35 motion in light of this delay. The Idaho Court of Appeals has held that it is ultimately defense counsel’s responsibility to request that the district court make a ruling on a Rule 35 motion within a reasonable

time frame, or otherwise provide an adequate record and justification for the delay, to avoid the risk of the trial court losing jurisdiction. *Day*, 131 Idaho at 186, 953 P.2d at 626. Similarly, when requesting restitution, it is the State's burden to make the restitution request and it should be the State's burden to follow up with the district court to ensure that the restitution request is being acted on within a reasonable time frame and that any delay is justified as necessary. Here, the State admitted at the eventual restitution hearing that it could have been more diligent in pursuing restitution and that the request did not come because the amounts of restitution had just come to light, but rather because the State simply just figured out that restitution had never been ordered. (Tr., p.52, L.19 – p.53, L.8.)

Ultimately, the delay of six years from the judgment of conviction (or five years from the remittitur) prior to issuing the original restitution order and the seven year delay prior to entering the amended restitution order was not a reasonable time for restitution to be determined. Therefore, the district court did not have jurisdiction to enter either the restitution order and the Amended Order of Restitution should be vacated because the delay in filing was not reasonable.

II.

The District Court Erred When It Ordered Restitution Because The State Failed To Demonstrate The Delay In Filing For Restitution Was Reasonable And Necessary

Even if the district court still had subject matter jurisdiction over Ms. Jensen's case to enter the restitution order, it still did not have the authority or general jurisdiction under Idaho Code section 19-5304 to order jurisdiction. As noted above in section I, Idaho Code section 19-5304 provides the authority for the district court in a criminal

case to order the payment of restitution to the victims of the defendant's crime and under Idaho Code section 19-5304(6), "[r]estitution orders **shall** be entered by the court at the time of sentencing or such later date as deemed necessary by the court." I.C. § 19-5304(6) (emphasis added); see also *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (2002). Therefore, the trial court's exercise of discretion in requiring restitution must be within the boundaries provided in this statute. *State v. Cheeney*, 144 Idaho 294, 296, 160 P.3d 451, 453 (Ct. App. 2007). Furthermore, the interpretation of this statute is a question of law over which the appellate courts exercise free review. *Id.*; *State v. Waidelich*, 140 Idaho 622, 623, 97 P.3d 489, 490 (Ct. App. 2004). Ms. Jensen contends that the district court exceeded the boundaries of this statute because the State did not demonstrate that the six to seven years taken by the State to pursue a restitution order was a reasonable amount of time necessary for them to compute the amount of restitution and for the district court to issue the amended order of restitution.¹

Idaho code section 19-5304(6) "contemplates that that the court may need to grant the prosecution a reasonable amount of time necessary to gather information so as to locate all the victims and correctly compute the amount of restitution." *Ferguson*, 138 Idaho at 662, 67 P.3d at 1274 (emphasis in original). It is the State's obligation to demonstrate that the delay in an entry of the order of restitution was necessary. *Id.*

¹ Arguably the approximately one year spent between the original restitution order and the amended restitution order were spent by the State attempting to at least pursue a restitution request; therefore, it is the six years prior to this that Ms. Jensen is mainly concerned with and argues was not a reasonable amount of time to pursue jurisdiction in this case.

Here, when ruling on the State's motion for restitution, the district court mistakenly concentrated on whether the delay in filing the order of restitution prejudiced Ms. Jensen as opposed to whether it was "necessary," which is the standard provided for in Idaho Code section 19-5403. In making its findings the district court stated:

Idaho Code Section 5304(6) says restitution should be requested at the time of sentencing or at a later date. This case does present a lot of, I guess the best word I can use is anomalies, a change of status of the previous sentencing judge. Frankly, I think the situation where this case sort of fell through the cracks, I hate to use that word so strongly. . . .but I think that is what [the prosecutor's office] is recognizing and I understand I think that's what happened.

The question in my mind is whether that delay has in any way prejudiced the position of the defendant in this case. I conclude it has not.

(Tr., p.65, Ls.3-15.) However, whether Ms. Jensen was prejudiced is not the correct standard. As noted above, the correct standard is whether the delay was "necessary." See I.C. § 19-5403. Here, the district court's findings do not indicate that the delay was necessary to determine the amount of restitution.

Furthermore, the State failed to demonstrate that the delay was necessary "to gather information so as to locate all the victims and correctly compute the amount of restitution." See *Ferguson*, 138 Idaho at 662, 67 P.3d at 1274. At the restitution hearing, the State noted that at the previous hearing it had discussed why the delay in restitution was so long stating:

Obviously at the previous hearing we did discuss what happened and why the state ultimately got a restitution order so much later than it ordinarily would. We discussed how that was tied up with the previous attorney in this case on the defense side and with the judge and then various things that resulted in obviously our office actually seeking an order from [the interim district court judge], which was much later than it would have been normally...

(Tr., p.35, Ls.15-23.) However, there was nothing on the record at the previous hearing indicating why there was a delay in filing the restitution order. (See Tr., p.4, L.6 – p.32, L.19.) Furthermore, the register of actions only indicates that hearings occurred on September 22, 2008, and December 15, 2008, after the Order of Restitution was originally filed, and that a hearing scheduled for November 10, 2008, was vacated. (R.36018, p.12.)

The State did not present any evidence or argument regarding why it was necessary to wait six years before asking that restitution be ordered. Instead, the prosecutor explained that previously Ms. Jensen had refused to agree to the restitution amount and that the sentencing judge advised Ms. Jensen that she needed to provide reasons or file paperwork regarding why she was contesting restitution, otherwise the order would be granted. (Tr., p.52, Ls.2-18.) That judge then “left to do water court and then he left to do something else.” (Tr., p.52, Ls.2-18.)² The prosecutor then stated:

I’m perfectly happy to concede that, you know, we should have been more diligent in making sure that that was done. In fact, I think that the way we discovered that it was not done is when we adjusted the figure for the other two defendants, there was no figure to adjust for Miss Jensen. And I could be leaving some things out. This is from the best of my memory, and as I indicated, you know, calling witnesses on this wasn’t our intention on this today. That’s how I think we got here.

And then we found out that there was no restitution order for Miss Jensen. We approached [the interm district court judge assigned to the case]. He signed the order, which is the order that she was ultimately made aware of...

(Tr., p.52, L.19 – p.53, L.8.) The State also argued that even if there was a delay in seeking restitution “it certainly didn’t operate to her detriment.” (Tr., p.60, Ls.3-5.)

² It should be noted that by 2004 a new judge had been assigned the case, when the motion for release of exhibits was filed. (R.36018, p.11.) This judge was still assigned to the case when the Order of Restitution was granted in 2007. (R.36018, p.11.)

None of this information provided by the prosecutor provided a reason why a delay of over six years was **necessary** for restitution to be ordered. The fact Ms. Jensen would not agree to the restitution amount and that she wanted a hearing or wanted to be able to provide information regarding the restitution amount, simply means that Ms. Jensen was asking the district court to follow the provisions of Idaho Code section 19-5304(6), which requires the State to prove the amount of restitution by a preponderance of the evidence and provides that either side has a right to present evidence relevant to the issue. I.C. § 19-5304(6). The State was still obligated to pursue its request for restitution regardless of whether the defense wanted to contest it. However, the State never even filed a motion for restitution in this case. (See R.36018, pp.6-13.)

Therefore, because the State failed to provide any reason why the delay of over six years was necessary in this case, the district court exceeded its authority or general jurisdiction to order restitution pursuant to I.C. § 19-5304(6) and the amended restitution order should be vacated.

III.

The Original Restitution Order, Which Was Vacated By The District Court And Not Appealed From, Should Not Now Be Affirmed By This Court

A. Introduction

In the Respondent's Brief, the State argues that the original restitution order, which was filed by the State six years after Ms. Jensen's judgment of conviction, and which was subsequently vacated by the district court pursuant to Idaho Rule of Civil Procedure 60(b) because Ms. Jensen was not given any notice of the order being filed,

should now be affirmed on appeal because the district court lacked jurisdiction to vacate it and Ms. Jensen now lacks jurisdiction to challenge it. (Respondent's Brief, pp.5-10.) Ms. Jensen contends that because the State failed to appeal from the order setting aside the original restitution order, it should not be able to contest that decision now. Furthermore, the district court's use of 60(b) was proper in this circumstance. Finally, even if the district court lacked jurisdiction to set aside the original order under 60(b), it also lacked jurisdiction to enter the order in the first place, therefore setting aside the order was proper.

B. The State Failed To Appeal From The Order Granting Idaho Rule Of Civil Procedure 60(b) Relief

In response to Ms. Jensen's argument that ordering her to pay restitution was improper due to the six year delay in filing such a request, the State contends, for the first time on appeal, that the district court lacked jurisdiction to grant Rule 60(b) relief, to vacate the original restitution order due to lack of notice, and to issue an amended order after providing notice and an opportunity to be heard to Ms. Jensen. (Respondent's Brief, pp.5-10.) Although the State is partially correct, lack of subject matter jurisdiction can be raised at anytime, not every jurisdictional challenge can be raised at anytime.

In *State v. Rogers*, 140 Idaho 223, 91 P.3d 1127 (2004) the Idaho Supreme Court explained:

"Jurisdiction over the subject matter" has been variously defined as referring to (1) the nature of the cause of action and of the relief sought; (2) the class of cases to which the particular one belongs and the nature of the cause of action and of the relief sought; (3) the power of a court to hear and determine cases of the general class to which the particular one belongs; (4) both the class of cases and the particular subject matter involved; and (5) the competency of the court to hear and decide the case. However, subject matter jurisdiction does not depend on the particular

parties in the case or on the manner in which they have stated their claims, nor does it depend on the correctness of any decision made by the court. Also, the location of a transaction or controversy usually does not determine subject matter jurisdiction.

Id. at 227-28, 91 P.3d at 1131-32 (quoting 20 Am. Jur. 2d *Courts* § 70 (1995)). In *State v. Armstrong*, 146 Idaho 372, 195 P.3d 731 (Ct. App. 2008), the Idaho Court of Appeals further elaborated on the concept of subject matter jurisdiction explaining how the general term “jurisdiction” is often mistakenly used to describe both subject matter jurisdiction and personal jurisdiction, as well as the district court’s authority to act or grant relief in general. *Id.* at 375-77, 195 P.3d at 734-36.

Here, the State’s arguments do not concentrate on the district court’s ability to apply Civil Rule 60(b) to restitution cases generally, the State concedes that it has that ability. Instead, the State challenges the use of 60(b) in this case and the manner in which it was applied. To the extent the State’s challenges are to the district court’s authority to act or grant relief and not the district court’s subject matter jurisdiction, these challenges cannot be raised on appeal for the first time. Furthermore, the State never filed an appeal from the district court’s order granting Rule 60(b) relief in this case, or a cross-appeal from the amended order of restitution under Idaho Appellate Rule 15. (R., pp.6-13.); see *Wright v. Wright*, 130 Idaho 918, 921, 950 P.2d 1257, 1260 (1998) (finding whether the district court improperly granted 60(b) relief was an appealable issue.). Therefore, the State cannot now raise challenges to anything other than the court’s subject matter jurisdiction.

C. The District Court's Use Of Idaho Rule Of Civil Procedure 60(b) Was Proper In This Circumstance

Furthermore, even if the State's argument does involve a question of subject matter jurisdiction, the district court had the jurisdiction to act. The State asserts that the district court's use of Rule 60(b) was in conflict with the restitution statute because the I.C. § 19-5304(10) only provides 42 days for the defendant to request relief from the order; therefore, because the 60(b) request was not filed within 42 days of the restitution order, the district court lacked jurisdiction to grant relief. (Respondent's Brief, pp.7-10.) However, such an interpretation creates a conflict between the 42 days articulated in statute and the time-lines outlined in Rule 60(b). Ms. Jensen asserts that because such a conflict involves a procedural question, rather than a substantive question, the court rule should control; therefore, the district court had authority to act under Rule 60(b).

The constitutional doctrine of separation of powers is well established in this state:

Our system of government is said to embody a separation of powers. Actually, it is more accurate to say that the three branches of government—legislative, executive and judicial—have areas of exclusive and shared authority. ... [T]he judiciary has exclusive authority, within constitutional constraints, to determine the internal processes by which it will perform fact-finding and law-stating functions of adjudication. These areas of exclusive responsibility often are characterized as "procedure." On the other hand, the legislature and judiciary share authority to define the rights and duties of private persons vis-a-vis each other or of government vis-a-vis individuals. On such issues, court rules or decisions may coexist with statutes so long as they do not conflict. When there is a conflict, the judiciary defers to the legislature unless the issue is governed by the state or federal constitution. In that event the judiciary's constitutional interpretation will prevail. This area of shared responsibility often is characterized as substantive law.

State v. Garza, 112 Idaho 778, 785-786, 735 P.2d 1089, 1096-1097 (Ct. App. 1987)

(Judge Burnett specially concurring). Therefore, when a conflict exists between a

statutory provision and a court rule regarding a matter of procedure the court rules prevail. *State v. Currington*, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985), *R.E.W. Constr. Co. v. Dist. Ct. of the Third Dist.*, 88 Idaho 426, 400 P.2d 390 (1965); *Carter v. State*, 108 Idaho 788, 797-98, 702 P.2d 826, 835-36 (1985) (McFadden, dissenting). In the criminal context, “[s]ubstantive law prescribes norms for societal conduct and punishment for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *Currington*, 108 Idaho at 541, 700 P.2d at 944 (quoting *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674, 677 (1974)); see also *Grover v. Isom*, 137 Idaho 770, 774, 53 P.3d 821, 825 (2002). Applying these same principles to the issue at hand, the time frame to seek relief from a judgment, as well as the time to seek relief from a restitution order, would both be procedural because they both relate to the practice and procedures of the courts to determine when a defendant can seek relief from a judgment or order of restitution. Therefore, the time constraints outlined in Rule 60(b) should prevail over the time limitations in 19-5304(10) and the district court had jurisdiction to grant Ms. Jensen 60(b) relief.

D. Even If The District Court Lacked Jurisdiction To Vacate The Order Under Idaho Rule Of Civil Procedure 60(b), The District Court Also Lacked Jurisdiction To Enter The Original Order Of Restitution In The First Place; Therefore, Vacating The Order Was Proper

Finally, even if the State is correct and the district court did lack jurisdiction under 60(b) to order restitution, the district court also lacked jurisdiction to enter the original restitution order in the first place. As argued above in section I, and incorporated herein

by reference, the district court lacked subject matter jurisdiction to order restitution in this case, either through the original order or the amended order. Therefore, even if a jurisdictional challenge to the district court's granting of the 60(b) motion can be entertained in this appeal, the district court's jurisdiction to issue the original restitution order should also be entertained in this appeal and this Court should find that the district court was without jurisdiction to enter the original restitution order.

IV.

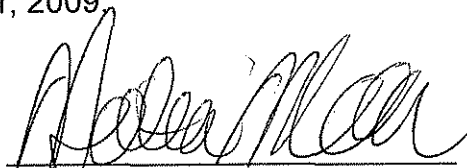
The District Court Abused Its Discretion When It Ordered Ms. Jensen To Pay \$22,500 In Restitution In Light Of Her Inability To Pay

For Ms. Jensen's arguments in support of this issue please see the Appellant's Brief, Section II.

CONCLUSION

Ms. Jensen respectfully requests that the Amended Order of Restitution in her case be vacated. Alternatively, she asks this Court to reduce the restitution order as it deems appropriate or remand her case to the district court for further proceedings.

DATED this 24th day of November, 2009



HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of November, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

VICKI A JENSEN
INMATE # 62794
PWCC
1451 FORE ROAD
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RANDY J STOKER
DISTRICT COURT JUDGE
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A handwritten signature in black ink, appearing to read 'Evan A. Smith', written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

HMC/eas